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Please reply to: Olympia

January 22, 1985

PRM-60-2

Mr. Samuel J. Chilk
Secretary
Nuclear Regulatory Commission
Room 1135
Matomic Building
1717 H Street Northwest
Washington, D.C. 20555

Attention: Chief, Docketing and Service Branch

Re: Petition for Rulemaking

Dear Mr. Chilk:

Enclosed is the original and one copy of the Petition of the States of Nevada and Minnesota for the adoption of a new regulation for the implementation of 40 CFR 191. This Petition is submitted in accordance with 10 CFR 2.802.

Please notify me of the docket number which has been assigned to this Petition by conforming the copy enclosed with the filed original and returning it to me.

Sincerely,

DURYEA, HOUCHINS,
MURPHY & DAVENPORT


James H. Davenport

JHD:tjl
Enclosure

cc: Chairman Nunzio Palladino
Commissioner James K. Asselstine
Commissioner Fredrich M. Bernthal
Commissioner Thomas M. Roberts
Commissioner Lando W. Zech Jr.
Mr. Sheldon Trubatch

Mr. Lee Thomas
Mr. Sheldon Myers
Mr. Robert Loux
Ms. Jocelyn F. Olson
Mr. William Olmstad ✓

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 BEFORE THE COMMISSIONERS

4 In the matter of)
5 the Petition of the)
6 States of Nevada and Minnesota)
7 for the Adoption of a)
8 New Regulation for the)
9 Implementation of 40 C.F.R. 191.)
10

DOCKET NO. _____

11 PETITION TO INSTITUTE RULEMAKING

12 The States of Nevada and Minnesota, Petitioner, hereby respectfully
13 requests and petitions the Nuclear Regulatory Commission, NRC, pursuant to 5
14 U.S.C § 553 and 10 C.F.R. §§ 2.800-2.804, to exercise its rulemaking authority
15 and adopt a regulation governing the implementation of proposed 40 C.F.R. 191
16 by the Nuclear Regulatory Commission.

17 I. Text of Proposed Rules.

18 A. Assurance Requirements.

19 To provide the confidence needed for compliance with the Environmental
20 Protection Agency's generally applicable Environmental Standards for the
21 management and disposal of spent nuclear fuel and high-level and transuranic
22 radioactive waste, 40 C.F.R. 191.13, the Commission shall determine the
23 compliance of any proposal of the Department of Energy for a construction
24 authorization for the development of a high-level nuclear waste repository with
25 those standards through application of the following:

26 PETITION FOR RULEMAKING

1

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(a) Active institutional controls over disposal sites should be maintained for as long a period of time as is reasonable after disposal; however, isolation of the wastes from the environment shall not rely upon any of the active controls for more than 100 years after disposal.

(b) During the period that active controls are maintained, disposal site shall be monitored to detect any substantial and detrimental deviations from expected performance. This monitoring shall be done with techniques that do not jeopardize the isolation of the wastes.

(c) Disposal sites shall be designated by the most permanent markers and records practicable to indicate the dangers of the wastes and their location.

(d) Disposal systems shall use several different types of barriers to isolate the wastes from the environment. Both engineered and natural barriers shall be included. Each barrier shall be designed or selected so that it complements the others and can significantly compensate for uncertainties about the performance of one or more of the other barriers.

(e) When selecting high-level radioactive waste repository sites from among alternatives considered in detail (e.g., from among those characterized in accordance with the Nuclear Waste Policy Act of 1982), one of the significant considerations shall be selection of sites that have natural properties that are expected to provide better isolation of the wastes from the accessible environment for 100,000 years after disposal. Analyses used to compare the capabilities of different sites to isolate wastes (with regard to this provision only) shall be based upon the following: (1) only the undisturbed performance of the disposal system should be considered; (2) the performance of the waste packages and

1 waste forms planned for the disposal system shall be assumed to be the same
2 from site to site and shall be assumed to be at least an order of magnitude less
3 effective than the performance required by 10 CFR 60.113; and (3) no credit
4 shall be taken for other engineering controls intended to correct preexisting
5 natural flaws in the geologic media (e.g., grouting of fissures should not be
6 assumed, but effective sealing of the shafts needed to construct the repository
7 should be assumed).

8 (f) Places where there has been mining for resources, or where there is a
9 reasonable expectation of exploration for scarce or easily accessible resources,
10 or where there is a significant concentration of any material that is not widely
11 available from other sources, should be avoided in selecting disposal sites. Such
12 places shall not be used for disposal of the wastes covered by this Part unless the
13 favorable characteristics of such places more than compensate for their greater
14 likelihood of being disturbed in the future.

15 (g) Disposal systems should be selected so that removal of most of the
16 wastes is not precluded for a reasonable period of time after disposal.

17 (h) Disposal systems shall be selected and designed to keep releases to
18 the accessible environment as small as reasonably achievable, taking into
19 account technical social and economic considerations.
20

21 B. Commission Findings.

22 The rules promulgated herein were originally proposed by the Environmen-
23 tal Protection Agency for inclusion in 40 C.F.R. 191 on December 29, 1982 57
24 C.F.R. 58196 pursuant to § 121(a) of the Nuclear Waste Policy Act, 42 U.S.C.
25

1 10141, the Atomic Energy Act of 1954, as amended, and the President's
2 Reorganization Plan No. 3 of 1970. Significant public comment was received by
3 the Environmental Protection Agency pursuant thereto. Such comment has been
4 reduced to written record which the Nuclear Regulatory Commission has
5 reviewed for substantive content. Also, response to such comment had been
6 incorporated by the Environmental Protection agency in its latest draft version
7 of the rule with amendment herein promulgated.

8 The President must recommend a first high-level nuclear waste repository
9 location to Congress by March 31, 1987 (§ 114(a)(2)(A), 42 U.S.C. 10134(a)(2)(A))
10 or March 31, 1988 if he determines an extension necessary (§ 114(a)(2)(B), 42
11 U.S.C. 10134(a)(2)(B)). The Nuclear Regulatory Commission must act upon an
12 application for construction authorization for that repository by January 1, 1989
13 or within 3 years of the application's filing (§ 114(d)(1), (2), 42 U.S.C. 10134(d)(1),
14 (2)). The President's recommendation must be based upon Department of Energy
15 site characterization at a site which must have been recommended by January 1,
16 1985 (§ 112(b)(1)(D), 42 U.S.C. 10133(b)(1)(D)). Site characterization must be
17 performed pursuant to a plan reviewed by the Commission and the affected state
18 (§ 113(b)(1), 42 U.S.C. 10133(b)(1)) before characterization begins. That plan
19 must include criteria to be used by DOE to determine the "suitability of such
20 candidate site for the location of a repository, developed pursuant to § 112(a);"
21 (§ 113(b)(1)(A)(iv), 42 U.S.C. 10133(b)(1)(A)(iv)). DOE's § 112(a) guidelines, as
22 concurred in by the Commission on June 22, 1984, 49 F.R. 28130, require that
23 evidence used to apply those guidelines include "analysis of expected repository
24 performance to assess the likelihood of demonstrating compliance with 40 C.F.R.

1 191 and 10 C.F.R. 60" Proposed 10 C.F.R. 960.3-1-5. The Commission
2 finds, therefore, that the rule herein enacted must be in place in order that the
3 Department of Energy may design its site characterization plan, for approval by
4 the Nuclear Regulatory Commission, in a manner consistent with its final
5 guidelines.

6 The Commission also finds that, as a matter of the legal requirements of
7 the Nuclear Waste Policy Act, the EPA's standards required by § 121(a) of the
8 Act must be final before environmental assessments prepared by DOE pursuant
9 to § 112(b)(1)(E) of the Act can be finally published and before DOE may
10 nominate a site or recommend a site for characterization pursuant to
11 § 112(b)(1)(A) and (B) of the Act.

12
13 C. 42 U.S.C. 2239(a)(2)(A).

14 The Commission finds that the rule promulgated herein does not amend any
15 operating license currently in effect.

16
17 II. Grounds and Interest.

18 Petitioner State of Nevada files this rulemaking Petition as a state
19 notified, pursuant to § 116(a) of the Nuclear Waste Policy Act, 42 U.S.C
20 10136(a), that a potentially acceptable site for a repository has been identified
21 within the state. The Draft Environmental Assessment of the Yucca Mountain
22 Site, Nevada Research and Development Area, Nevada, published on December
23 20, 1984, indicates that the Yucca Mountain site may be nominated under
24 § 112(b)(1)(A) of the Act and may be recommended for characterization under
25

1 § 112(b)(1)(B) of the Act. The State of Nevada may become affected for
2 purposes of participation in site characterization, pursuant to § 113 of the Act.
3 Nevada has an interest in, and the prevailing responsibility for, the protection of
4 the future health and safety of the citizens of the State of Nevada.

5 Petitioner State of Minnesota joins this Petition as a state informed by the
6 Department of Energy that, due to the presence of crystalline rock within its
7 borders, the State is being considered for site characterization for a second
8 repository. As a potentially acceptable state the State of Minnesota may be
9 directly affected by the substance of standards for development of repositories.
10 Minnesota has an interest in, and the prevailing responsibility for the protection
11 of the future health and safety of the citizens of the State of Minnesota.

12 13 III. Statement in Support.

14 The Nuclear Waste Policy Act was enacted by the Congress on December
15 20, 1982 and approved by the President on January 7, 1983. Section 121(a) of the
16 Act, 42 U.S.C. 10141(a), required the Environmental Protection Agency to
17 promulgate by rule, not later than one year after the date of the enactment of
18 the Act, or January 7, 1984, "generally applicable standards for protection of the
19 general environment from offsite releases from radioactive material in reposi-
20 tories." Pursuant to its view of that requirement and its general authority under
21 the Atomic Energy Act and the President's Reorganization Plan of 1970, the
22 Environmental Protection Agency published proposed "Environmental Standards
23 for the Management and Disposal of Spent Nuclear Fuel, High-Level and
24 Transuranic Radioactive Wastes" on December 29, 1982 (47 F.R. 58196). Those

1 proposed standards include Containment Requirement (proposed 40 C.F.R.
2 191.13), Assurance Requirements (proposed 40 C.F.R. 191.14) and Guidance for
3 Implementation (proposed 40 C.F.R. 191.16).

4 The Environmental Protection Agency received significant written
5 comment and conducted public hearings on the proposed standards. The entire
6 record of the rulemaking is contained within Environmental Protection Agency
7 Docket No. R 82-3 and is available for inspection in the West Tower Lobby,
8 Gallery One, Central Docket Section, 401 M Street Southeast, Washington, D.C.

9 In 1983, early in the process of notice and comment on EPA's proposed 40
10 C.F.R. 191, objections were raised regarding the authority of the Environmental
11 Protection Agency to promulgate that portion of its proposed rules contained in
12 proposed 40 C.F.R. 191.14, entitled "Assurance Requirements." These objections
13 were based on the legal argument that § 121(a) of the Nuclear Waste Policy Act,
14 42 U.S.C. 10141(a), specifically clarifies that EPA's authority to promulgate the
15 proposed rules arises "under other provisions of law." Those "other provisions of
16 law" include the Atomic Energy Act of 1954 as amended, 20 U.S.C. 2021(h), and
17 the President's Reorganization Plan No. 3 of 1970. The essence of the objection
18 was that the President's Reorganization Plan No. 3 of 1970 placed within the
19 Federal Radiation Council, now no longer in existence, rather than the Environ-
20 mental Protection Agency, the authority for such requirements as contained
21 within the proposed 40 C.F.R. 191.14.

22 On May 21, 1984, the Environmental Protection Agency published Working
23 Draft No. 4-Final 40 C.F.R. 191-5/21/84, the proposed environmental standards,
24 for review within EPA and other federal agencies.

1 Even though the Environmental Protection Agency's statutory deadline for
2 promulgation of the standards is past, the Environmental Protection Agency has
3 not finalized 40 C.F.R. 191 as required by § 112(a) of the Nuclear Waste Policy
4 Act. The primary reason for that failure is the jurisdictional issue of the
5 Environmental Protection Agency's authority to promulgate requirements of the
6 nature contained in proposed 40 C.F.R. 191.14.

7 Even though Congress recognized, in § 121(a) of the Nuclear Waste Policy
8 Act, 42 U.S.C. 10141(a), that EPA's authority to promulgate the standards
9 existed "pursuant to authority under other provisions of law," Congress clearly
10 believed that such other authority included the authority to promulgate
11 "generally applicable standards for protection of the general environment from
12 offsite releases of radioactive material and repositories." Proposed 40 C.F.R.
13 191.14, Assurance Requirements, are clearly such "generally applicable
14 standards." To the extent that 20 U.S.C. 2021(h) or the President's Reorganiza-
15 tion Plan No. 3 of 1970 have an alternate legal meaning, it would seem that
16 § 121(a) prevails over that earlier law and contains the necessary EPA authority.

17 Because proposed 40 C.F.R. 191.14 contains generally applicable standards
18 for the protection of the general environment from offsite releases from
19 radioactive materials in repositories, the Environmental Protection Agency
20 should proceed to finalize 40 C.F.R. 191. However, dispute as to the question of
21 authority continues to preclude that from happening. (Fortunately, the general
22 authority of the Nuclear Regulatory Commission to protect the health and safety
23 of the public against radiation hazards under the Atomic Energy Act endows the
24 Commission with the power to enact regulations of the nature contained in
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1 proposed 40 C.F.R. 191.14 notwithstanding EPA's authority. Inasmuch as no
2 objections have been raised to the substance of proposed 40 C.F.R. 191.14, and
3 because the proposed rule does provide confidence that the requirements of
4 proposed 40 C.F.R. 191.13 would be met by a repository, the NRC should enact
5 the proposed regulation under its own authority, thereby totally removing the
6 jurisdictional issue as an impediment to EPA's promulgation of the proposed
7 section. When that impediment is removed, the Environmental Protection
8 Agency could move to final adoption of its rule.

9 It is important that the EPA finalize its § 121(a) standards. Those
10 standards are the performance criteria against which a repository host media
11 must be selected and a repository engineered. Site characterization is the
12 process by which DOE will fully evaluate and project whether EPA standards can
13 be met at a particular location. DOE's site characterization plan required by
14 § 113(b) of the Act establishes the DOE's method of performing that evaluation
15 and prediction. It would not be possible for DOE to draft that plan nor for the
16 Commission to review that plan, as impliedly required by § 113(b)(1)(A)(v) and
17 (c)(2)(A) of the Act, if EPA's standards were not yet final. (See also 10 C.F.R.
18 60.11(b)-(g) and SECY-84-263.) DOE could certainly not make nomination
19 decisions required by § 112(b)(1)(A) or recommendations for characterization
20 required by § 112(b)(1)(B) if no final EPA standard is in existence against which
21 to compare the relative merits of respective sites. This logic is confirmed by
22 the fact that § 121(a) requires EPA standards be final a full year before the date
23 by which § 112(b)(1)(B) requires that the first three sites be recommended for
24 characterization.

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IV. Prayer.

Petitioners pray the Nuclear Regulatory Commission to adopt a regulation governing the implementation of proposed 40 C.F.R. 191 as proposed in Section I of this Petition.

Dated this 21st day of January, 1985.

by:

STATE OF NEVADA

STATE OF MINNESOTA

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